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PRATTS HAND BOOK

FOR BANK DIRECTORS AND OFFICERS

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PRATTS' HAND BOOK

FOR BANK DIRECTORS AND OFFICERS

A TREATISE

ON THE

Powers, Duties and Liabilities

OF

Bank Directors and Officers

WITH

DIGEST OF DECISIONS OF THE COURTS AND REFERENCES TO CASES CITED

PUBLISHED BY

A. S. PRATT & SONS

BANK ATTORNEYS

WASHINGTON, D. C.

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INTRODUCTORY

This book treats of Bank Directors and Officers as servants of the Law, the qualifications they must possess, the requirements of their several positions, their powers inherent and delegated and their liability for overt act or negligence.

The construction of the law relating to the management of banking institutions of late years has been more rigid than formerly as regards those accepting this important trust. Especially as regards directors, in that they are now expected to take a very active part in the management of the bank, which before was practically committed almost entirely to the executive officer of the institution, the Board of Directors being little more than a counseling body. The President of the bank also is now required to be more fully what his title implies, the chief officer, exercising a general supervision of the bank's affairs instead of being a mere figurehead, from his standing as a man of wealth and prominence in the community.

It is evident, therefore, that any person associated in the management of a banking institution should be fully informed as to the responsibility assumed and the requirements of his office. It is the intent of this publication to furnish the information required and in form for ready reference.

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ESTABLISHED 1867

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Washington, D. C.

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before the
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Directors of Banks,

Their Powers, Duties and Liabilities.

Powers in General—Compensation.—The management of the affairs of an incorporated bank is usually committed, by the charter or the general banking laws under which the bank is organized, to a board of directors, or, as they are sometimes called, trustees or managers. The directors have power to act for the institution in any matters pertaining to its regular business. They have, in general, power to control all the property of the bank, to make discounts, to borrow money for the use of the bank, to transfer and assign its property, to appoint its officers and agents and prescribe their duties, and, in short, to exercise all the powers conferred upon the bank which are fairly within the scope of its regular and ordinary business.* And this power is exclusive even of the shareholders. Thus, the shareholders could not by resolution authorize a transfer of the bank's property; this can be done only through the directors. So, the board of directors alone is empowered to declare dividends; the shareholders have no power to direct a distribution of the profits.

But except they are authorized to do so by the statutory

* Burrill *v.* Nahant Bank, 2 Metc. (Mass.), 163; Hoyt *v.* Thompson, 19 N. Y., 207; Dana *v.* Bank of U. S., 5 W. & S., 223; Bank of U. S. *v.* Dunn, 6 Peters, 51; Merick *v.* Meropolis Bank, 8 Gill, 59.

laws by which the bank is governed, the directors cannot bind the bank by acts done outside of the regular business. Thus, they cannot increase or reduce the amount of capital stock, or wind up the business, or sell its property so as to disable it from carrying on its business. These and all similar matters are to be determined by the shareholders, unless the legislature has provided otherwise.[1] And the acts of the directors in dealing with and investing the funds of the stockholders must, in order to bind the bank, be confined to the expressed purposes for which the bank was incorporated, and to purposes necessarily incidental thereto in the successful conduct of its legitimate business.[2] Thus, they could not bind the bank by authorizing the president or cashier to make an accommodation indorsement, or to use the funds of the bank in speculations.

A director is not entitled to compensation for his services as director in the absence of any agreement in advance that he shall receive such compensation. The directors have not authority to vote salaries to themselves after their election as directors.[3] But in many banks directors, by consent of the stockholders, are compensated for their attendance at the meetings, and the stockholders may vote them any remuneration they like.

Declaration of Dividends.—Ordinarily the question whether a dividend shall be declared and the amount thereof rests in the discretion of the directors. But where the earnings properly applicable to a dividend are ample for such purpose, and the directors, or a majority of them, acting in bad faith and without reasonable cause, refuse to declare a dividend, the courts will interpose on behalf of these stockholders who otherwise would be without rem-

[1] Percy *v.* Millaudon, 8 Martin (N. S.), 68; Bank Commissioner *v.* Bank of Brest, 1 Harring Ch. (Mich.), 106; Gibson *v.* Goldthwaite, 7 Ala., 281.

[2] Bank of Commerce *v.* Hart.

[3] Wickersham *v.* Chittenden, 93 Cal., 17.

edy, and require the directors to make a dividend of reasonable amount.[4] An action for this purpose may be maintained in a State court.

Qualifications: Ownership of Stock—Residence—Women as Directors.—All banking laws require that every director shall be a stockholder, and usually there is some requirement as to citizenship and residence. In the case of the National banks each director must own, in his own right, at least ten shares of stock, unless the capital of the bank does not exceed $25,000, when five shares are sufficient.[5] As the stock must be held in the director's own right, no person who holds stock in a merely representative capacity —that is to say, as executor, administrator, guardian or trustee—possesses the necessary stock qualification. A director who owns more than the required number of shares may sell or pledge all of his stock except the requisite number without becoming disqualified. But if he fails to retain the ownership of the necessary number (five or ten, as the case may be) this would seem to vacate his place in the board *ipso facto,* without any removal by the other directors. The National Bank Act further requires that every director, during his whole term of service, shall be a citizen of the United States, and that three-fourths of the directors must have resided in the State where the bank is located for at least one year immediately preceding their election, and must be such residents during their continuance in office.[6] Similar provisions are also found in the banking laws of many of the States.

As the only qualifications required by the statutes usually are citizenship, residence and ownership of stock, there is no reason why an unmarried woman may not be a director; and now, as nearly all, if not all, of the States permit married women to own bank stock in their own

[4] Hiscock *v.* Lacy, N. Y., 9 Misc. (N. Y.), 578.
[5] Rev. Stat. U. S. Sec. 5146, as amended by act Feb. 28, 1905.
[6] Rev. Stat. U. S. Sec. 5146.

right, there is no legal obstacle to the election of a married woman to such a position.

Election—Proxies—Term of Office.—The National Bank Act fixes the month of January as the time for holding the annual meeting for the election of directors,[7] and many of the State laws have fixed the same time, so that now the election of bank directors in January is quite general throughout the country. The National Bank Act provides that no officer, clerk, teller or bookkeeper of the bank shall act as proxy at an election of directors.[8] Whether this means only an *executive* officer, such as the president, vice-president or cashier, or whether it applies as well to a director is not entirely clear. There appears to have been no judicial decision on the point. The view formerly taken by the Comptrollers of the Currency was that a director is not an officer within the intendment of this provision. But the contrary view is now held. The closing paragraph of Section 5240 would seem to sustain this ruling, and this appears to better conform to the spirit of the law. The bank is under the control of the directors, and they have in many cases a great personal interest in the action of the meeting, especially where the meeting is held for the election of directors, and they are candidates for re-election. In all cases it is better, in order to avoid any question, that the proxy shall be a person not identified in any way with the management of the bank. The term of office is usually one year; but where no election is held at the appointed time, the directors chosen at the previous meeting continue in office until their successors are elected.[9]

Oath of Director.—Directors of National banks are required to qualify by taking oath, the National Bank Act providing that each director when elected shall take an

[7] Rev. Stat. U. S., Sec. 5145.
[8] Rev. St. U. S. Sec. 5144.
[9] Rev. Stat. U. S. Sec. 5145.

oath that he will, so far as the duty devolves upon him, diligently and honestly administer the affairs of the bank, and will not knowingly violate, or willingly permit to be violated, any of the provisions of the National Bank Act, and that he is the owner in good faith of the required amount of stock, and that the same is not hypothecated, or in any way pledged, as security for a loan or debt.[10] But the law as respects oaths of directors of National banks is fatally defective, in that Congress has failed to prescribe any officer before whom the oath may be taken. In order that an oath may have any efficacy it must be prescribed by law, and be taken before an officer duly authorized to administer it. That act of February 26, 1881, which authorizes a notary public to administer the oath, mentioned in Rev. Stat. Sec. 5211, applies only to the oath to reports of the bank's condition. As regards the other oaths required by the National Banking Law, including the oath of directors, there appears to be no officer competent to administer them.[11] The Comptroller of the Currency, however, requires this oath to be taken.

Resignation—Leave of Absence.—A director is not required to serve out his term, but may resign during the term.[12] "We do not understand," said the Supreme Court of the United States in Briggs v. Spaulding,[13] "that because Section 5145 R. S. provides that directors shall hold office for one year and until their successors have been elected and have qualified, this prohibits resignations during the year."

The resignation should be tendered to the board, and not to the shareholders. As the president is the head of the board, the resignation may be tendered to him.[14] Putting a resignation in writing is the more orderly and proper

[10] Rev. Stat. U. S. Sec. 514.
[11] United States *v.* Curtis, 107 U. S. 671.
[12] Briggs *v.* Spaulding, 141 U. S., 132.
[13] 141 U. S., 132.
[14] Movius *v.* Lee, 30 Fed. Rep., 298.

mode of procedure, but an oral resignation will be effectual if adequately proven.[15]

It is within the power of the board to give a director a leave of absence on account of ill health,[16] and where a director is granted a leave of absence for this reason it is not incumbent upon him to tender his resignation at the peril of otherwise being held liable for losses that may occur during his absence through the mismanagement of the bank.[17]

Quorum.—The by-laws of the bank usually specify the number of directors necessary to constitute a quorum. This is generally fixed at a majority of the full board; and this would be the rule in the absence of such a by-law. But unless the by-laws or articles of association provide otherwise, a resolution may be adopted by a majority of those present, though this number is less than a majority of the full board.

Can Act Only As a Board.—The directors must act as a board, and not singly. And the mere fact that persons

[15] Briggs *v.* Spaulding, 141 U. S., 132.

[16] *Id.*

[17] *Id.* The court said: "It appears that at this meeting a resolution was adopted giving Charles T. Coit, the president, a leave of absence on account of ill health for one year. No one was elected president prior to January 10, 1882, in his place. There is no doubt of the severity of his illness and the necessity of his absence; but it is contended that the resolution referred to absence as president and not as director, and that no power existed to allow leave of absence to a member of the board, and so that the resolution should be limited to excuse him from attendance at the bank, but not permit him to leave the city; and it is said that if he wished to be absolved from responsibility while absent in search of restored health, he should have resigned. If such were the rule, we apprehend that moneyed corporations would find extreme difficulty in obtaining proper persons to act as directors. But it is not the rule. Mr. Coit was guilty of no want of ordinary care in acting upon the leave of absence, and is not to be held because he did not resign. Invalids are permitted to indulge in the hope of recovery, and not called upon by reason of illness to retire at once from the affairs of this world, and confine themselves to preparations for their passage into another."

are directors will not enable them to bind the bank by acts done independently of the other members of the board. Oftentimes, it is true, a single director when acting alone may represent the bank in various matters; but in such case his power is not simply in virtue of his office—a power inherent in the office of director—but is derived from another circumstance, viz., that he has been authorized by the board to act as the agent of the bank in such matters. In a case before the Supreme Court of Kansas it was said: "The election of an individual as a director does not constitute him an agent of the corporation with authority to act separately and independently of his fellow-members. It is the board duly convened and acting as a unit that is made the representative of the association. The assent or determination of the members of the board acting separately and individually is not the assent of the corporation. The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the association shall be arrived at and expressed only after a consultation at a meeting of the board attended by at least a majority of its members." [18] This principle is elementary in the law of corporations, and is sustained by a great number of adjudications.

Right of Access to Bank's Records.—Every director has the right to know how the affairs of the bank are conducted, and about the action of his co-directors in their management of the institution; and, therefore, the majority cannot exclude one of their number from access to the books and records of the bank. Accordingly, it has been held that a by-law which was aimed at a single member, and was intended to prevent him inspecting the discount book, was invalid; and it was held to be no defense to the action of the majority that they considered the particular director hostile to the institution and its interests.[19] In this case the court said: "The thirteen di-

[18] First National Bank *v.* Drake, 35 Kans., 564.
[19] People *v.* Throop, 12 Wend, 183.

rectors were elected by the same stockholders, at the same election, to hold for the same term, clothed with the same powers, invested with the same trusts—each to exercise his best judgment in the management of the affairs of the company. Suppose a difference of opinion exists among the directors, a majority must control; but if they are divided, say six against seven, is it competent for the majority to turn the minority out of the directors' room, and refuse them any information of the business transactions of the bank? Surely, such an outrage could not be defended; nor can I conceive of any plausible apology for it. The directors, thus virtually ejected from office, might be the principal stockholders in the bank, and the majority might have very little interest therein, or might be hostile to the best interests of the institution. These are possibilities, but have little or nothing to do with the question of right. Every director has an equal right in regard to this matter."

Directors Presumed to Know Condition of Bank.—Directors of a bank are presumed to have knowledge of the transactions, business and condition of the bank, which presumption is conclusive upon them, and against the existence of which, as a matter of fact, no testimony will be received. It being their duty to have such knowledge, they will not be permitted to plead ignorance, and thereby profit by their neglect of duty. Accordingly, where a director had sold his stock at a time when the bank was insolvent, and had taken in payment a check upon the bank drawn by a person who had no funds to his credit, it was held that he was presumed to know the condition of the bank, and also the fact that the drawee of the check had no funds on deposit,[20] and the same rule applies in respect

[20] German Savings Bank *v.* Wulfekuhler, 19 Kans., 60. The court said: "While we assume, as a matter of fact, that the defendant knew nothing of the condition or management of said bank, and nothing of the condition of Herman's account with the bank, yet still as a matter of law we think we must presume

to dealings between the bank and the public. Hence, where bonds left with the bank on a special deposit have been sold by the bank officers and the money applied to the use of the bank, it will be presumed that the directors had knowledge of the fact when it could have been ascertained from the books and statements of the bank.[21]

But this rule is founded in public policy, and its object is to protect innocent parties dealing with the bank and having an interest therein; it will not be upheld in

that he knew all about these matters. He was a director and the vice-president of the bank, and it was his duty to have such knowledge, and therefore the law will conclusively presume that he had it. He cannot now, as against the interests of the bank and its stockholders and perhaps its creditors, be allowed to plead ignorance and innocence, and thereby profit by his own want of knowledge and by his own failure to do his duty as an officer of the bank. Such would be against both morals and law. Of course, we do not hold that a director is bound to know everything that transpires in a bank, and at the very time when it occurs. But we do hold that a director, having personal and private dealings with his bank, is bound to know (so far as the same affects his personal dealings) the general condition and management of his bank and everything of importance that occurs therein, either at the time it occurs or soon thereafter."

[21] United Society of Shakers *v.* Underwood, 9 Bush., 609. The court said: "It is the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention to their duties they may, in controversies with persons transacting business with the bank, be presumed to have. They cannot be heard to say that they were not apprised of the facts shown to exist by the ledger, books, accounts, correspondence, reconcilements, and statements of the bank, and which would have come to their knowledge except for their gross neglect or inattention. It is not necessary in many cases to show directly that the directors actually had their attention called to the mismanagement of the affairs of the bank or the misconduct of the subordinate officers. It is sufficient to show that the evidences of the mismanagement or misconduct were such that it must have been brought to their knowledge unless they were grossly negligent or wilfully careless in the discharge of their duties. If it shall turn out upon the trial of these actions that the ledgers, books, etc., of the bank showed that the special deposits of these appellants were being sold, and that this fact would have been discovered by appellees by the use of ordinary diligence, then the presumption of actual knowledge will arise."

favor of one who does not occupy the position of an innocent third party in interest. Accordingly, it has been held that an officer of a bank who had abstracted and misapplied some of its funds could not set up this presumption in order to show a ratification of his acts by the directors. For to have permitted him to do this would have been to turn a presumption intended to enforce fidelity and watchfulness of the directors into an instrument of injury and destruction to the bank and its stockholders.[22]

And knowledge of the affairs of a bank, or what its books and papers would show, cannot be imputed to a director for the purpose of charging him with an individual liability, unless it can be shown that but for gross negligence he would have actually had such knowledge.[23] Hence, in a late case in Pennsylvania it was held that the failure of bank directors to examine the individual ledger of the bank, which, by the rules of the bank, and of most other banks in the same city, directors were not permitted to see and in which alone the frauds by which the bank was being wrecked could be discovered, would not make them liable for the fraud of the officers and employés of the bank.[24]

[22] First Nat'l Bank *v.* Drake, 29 Kans., 311.

[23] Briggs *v.* Spaulding, 141 U. S., 132.

[24] Swentzel *v.* Penn. Bank, 147 Pa. St., 140. The court said: "The bank was wrecked by its president, with the cashier and some of the clerks aiding and abetting. It was adroitly done, so far as the means were concerned, and it was concealed wholly from the directors. False entries were made in the books, and false accounts, or accounts with fictitious persons, were opened so as to hide the theft. The reports of the bank's condition made by the president to the directors from time to time showed it to be in good condition, while in point of fact it was honeycombed with fraud and its assets squandered in wild speculations. It may be asked why did not the directors discover this by an examination of the books? The answer is that if they had examined every book in the bank, with a single exception, they would not have found the fraud. The exception is the individual ledger. All the frauds were dumped into this book and appeared nowhere else. The individual ledger contains the accounts of the individual depositors, and this book, by the rules of a large majority of the Pittsburgh banks, the directors are not allowed to

When Bank is Charged with Knowledge of Director.—The general rule of agency that notice to the agent in the course of the transaction in which he is acting for his principal, of facts affecting the nature and character of such transaction is constructive notice to the principal, applies in the case of a bank or other company or corporation, as well as in the case of an individual. But the rule requires that in order to charge the bank with the knowledge of the officer he must be acting as its agent in the business to which this knowledge relates; the mere fact that he is an officer will not affect the bank with his knowledge. In general, if the knowledge of the officer was acquired in his official capacity, the bank also is presumed to have it; but if it was acquired as any private person may have acquired it, the bank is not chargeable.[25] And a bank is not chargeable with the knowledge of one of its officers in a matter in which he acts for himself and deals with the bank in his own behalf?[26]

From these principles it follows that the bank cannot be affected by the knowledge of a director unless he is its representative in the business to which the knowledge re-

see. This is a rule of policy on the part of most city banks, and the reason for it is at least plausible. A director largely engaged in business may have a number of rivals in the same business who are depositors in the bank. If he is permitted to examine their accounts it gives him an advantage and an insight into a rival's affairs that few business men would tolerate. Hence it is a question with many banks whether to adopt this rule or lose valuable customers, and they generally prefer the former. We are not speaking of the wisdom of the rule, only of its existence, as bearing upon the question of the directors' negligence. Are they to be held to be guilty of gross negligence in not examining a book which, by the rules of their own bank, and of four-fifths of the other banks in Pittsburgh, the directors are not permitted to see?

Where a bank officer who has the management of the bank misrepresents the condition of the bank he is liable to a person injured thereby, though he did not intend to deceive, if, by the exercise of ordinary diligence, he could have known that the statement was not true. Giddings *v.* Baker, 80 Tex., 308.

[25] Nat'l Bank *v.* Norton, 1 Hill, 572; Washington Bank *v.* Lewis, 22 Pick., 24; Atlantic State Bank *v.* Savery, 82 N. Y., 291.

[26] Koehler *v.* Dodge, 31 Neb., 328.

lates, or unless he should communicate such knowledge to the board or to some other authorized agent of the bank. The bank will not be charged with his merely private knowledge any more than it would with the knowledge of an entire stranger.[27] For, as we have seen elsewhere in this book, the directors can act only as a board and a director as such has no independent powers of business. Thus, for instance, the mere fact that a director has knowledge that paper offered for discount is tainted with fraud will not affect the right of the bank to recover thereon; but if the director who has such knowledge acts for the bank in discounting the note, then his act is the act of the bank, and the bank will be held to have notice of all facts with which he is acquainted.[28] And the mere fact that a director of a corporation for which a note is discounted is also a director of the bank does not charge the bank with knowledge of the equities existing between such corporation and the maker of the note.[29]

Delegation of Authority to Subordinate Agencies.—The directors do not exercise a delegated authority in the sense in which the rule applies to agents and attorneys, who exercise the powers specially conferred on them and no others; and they may delegate many of their powers to inferior agents and to committees composed of a part only of the members of the board.[30] Thus, they may vest the power to make discounts in a committee consisting of only a few of the directors, or of a few of the directors and the

[27] Nat'l Bank *v.* Norton, supra; United States Bank *v.* Davis, 2 Hill, 451; Westfield Bank *v.* Cornen, 37 N. Y., 320; First Nat'l Bank *v.* Gifford, 47 Iowa, 575.

[28] Nat'l Security Bank *v.* Cushman, 121 Mass., 490.

[29] Casco Nat'l Bank of Portland *v.* Clark, 18 N. Y. Supp., 887. The discount committee of a bank consisted of the president and cashier. They discounted a note on which the president was the payee and endorser. *Held*, that the bank had notice of the equities existing in favor of the maker at the time of such discount. Le Duc *v.* Moore, 111 N. C., 516.

[30] Hoyt *v.* Thompson, 19 N. Y., 207; Burrill *v.* Nahant Bank, 2 Metc. (Mass.), 163.

principal executive officer or officers of the bank.[31] So they may delegate to a committee of their number authority to mortgage or sell the property of the corporation,[32] or to pay its debts, [33] or to borrow money and obtain discounts on its behalf.[34] And upon the same principle it was held, in the case of a banking corporation whose charter declared that its powers should be exercised by a board of twenty-three members, and that a by-law authorizing a quorum of five directors, including the president, to transact ordinary business was a valid regulation.[35] And in this case the court, after showing that the directors might delegate to subordinate agents or agencies authority to transact the ordinary business of the corporation, said, in regard to the by-law in question: "It was in substance and effect a regulation which constituted a subordinate agency to conduct the ordinary business of the corporation. The persons composing the agency would change according as the quorum or five or more directors attending the meetings might be constituted of different individuals. But if the board could delegate the power of transacting business to five or more individuals named, no doubt exists that the same authority might be imparted to a shifting quorum composed of the same number." [36]

When Directors are Charged with Knowledge of Subordinate.—If the directors neglect to exercise a reasonable oversight and supervision of the bank's officers and employees, and virtually place the entire management in the

[31] Nat'l Security Bank *v.* Cushman, *supra.*

[32] Hoyt *v.* Thompson, *supra;* Burrill *v.* Nahant Bank, *supra.*

[33] *Ex parte* Conway, 4 Pike, 350;

[34] Ridgway *v.* Farmers' Bank, 12 S. & R., 256; Leavitt *v.* Yates, Sandf. Ch., 134.

[35] Hoyt *v.* Thompson, *supra.*

[36] Where the by-laws of a bank prescribe that there shall be an "exchange committee" to consist of the president, the cashier and a designated director, the failure to designate a director for such committee does not deprive the committee of its powers, but the two members have the right to act. Wallace *v.* Exchange Bank of Spencer, 126 Ind., 265.

hands of one officer, for example, the cashier, and this officer, by the use of the machinery and organization of the bank, misappropriates funds of which he is the trustee, for example, funds in his custody as administrator, the mere fact that the directors did not have actual knowledge of his fraudulent operations is no defense to the bank in a suit against it to recover the funds; for the negilgent ignorance of the directors is as affective in law to charge the bank as their actual knowledge.[37]

The Degree of Care Required of Directors.—The degree of care required of directors is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that, the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to

[37] Lowndes *v.* City Nat. Bank, 82 Conn., 8. In this case the court said: "The directors had substantially surrendered to Layton the performance of their duties, and permitted him to conduct the affairs of the bank almost without interference, supervision or oversight on their part. They had created a practically one-man power, and lodged that power in him. He was thus enabled to carry on his fraudulent operations without their actual knowledge. By the exercise of ordinary diligence on their part they would have obtained knowledge of his irregularities. The law requires of directors the exercise of good faith and ordinary diligence and care in the performance of their duties. These duties include that of reasonable oversight and supervision. Briggs *v.* Spaulding, 141 U. S., 132. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. 1 Thomp. on Neg. (2d Ed.) Sec. 8; Fishkill Savings Institution *v.* National Bank, 80 N. Y., 162, 168. 'Directors cannnot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty . . . exercise reasonable control and supervision of its officers. . . . That which they ought, by proper diligence to have known as to the general course of business in the bank, they must be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." Martin *v.* Webb, 110 U. S., 7, 15.

be determined under all the circumstances.[38] This is as definitely as the rule can be stated, and each case must be governed by its own peculiar facts.

In a case in Pennsylvania [39] it was said that while directors are required to exercise ordinary care, this is not the ordinary care which a man takes of his own affairs, but the ordinary care of a bank director in the business of a bank, and that if a director performed his duty as such in the same manner as they were performed by all other directors of all other banks in the same city, he was not guilty of actionable negligence. And the Supreme Court of the United States has said that a liability of this kind should not lightly be imposed upon directors in the ab-

[38] Briggs *v.* Spaulding, 141 U. S., 132; Hanna *v.* Lyon, 179 N. Y., 107; Cassidy *v.* Uhlman, 170 N. Y., 517; Wallace *v.* Lincoln Savings Bank, 89 Tenn., 630; Williams *v.* MacKay, 40 N. J. Eq., 197; Hun *v.* Cary, 82 N. Y., 65; Myer *v.* Caperton, 87 Ky., 306; United Society of Shakers *v.* Underwood, 9 Bush., 609; Ackerman *v.* Halsey, 37 N. J. Eq., 356; Williams *v.* Halliard, 38 N. J. Eq., 373; Percy *v.* Millaudon, 3 La., 68.

[39] Swentzel *v.* Penn. Bank, 147 Pa. St., 140. "It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives no compensation for his services. He is a gratuitous mandatary. His principal business at the bank is to assist in discounting paper, and for that purpose he attends at the bank at stated periods—generally once or twice a week—for an hour or two. The condition of the bank is then laid before him in order that he may know how much money there is to loan. Once or twice a year there is an examination of the condition of the bank in which he participates. The cash on hand is counted, the bills receivable and securities examined, to see whether they correspond with the statement as furnished by the officers. Beyond this he has little to do with either the cash or the books of the bank. They are in the care of salaried officials who are paid for such services and selected by reason of their supposed integrity and fitness. To expect a director, under such circumstances, to give the affairs of the bank the same care that he takes of his own business is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a city bank doing a large business he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs."

sence of any element of a positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which they are required to respond were the natural and necessary consequence of omission of duty on their part.[40]

While directors are often styled trustees, they are not such in any technical sense; the relation between the corporation and them is rather that of principal and agent; but under certain circumstances they may be treated as occupying the position of trustees to *cestui que trust.*[41]

It is not to be supposed that the degree of care required of bank directors is the same, and no greater, than that required of the directors of every other kind of corporation. The degree of care due from persons acting in behalf of others depends upon the objects to which the care is to be applied. Thus (to use an old and familiar illustration) the degree of care which would be sufficient where the object is a quantity of iron might be wholly insufficient where the object is a jewel. So, the affairs of a bank would seem to require a higher degree of care than the affairs of many other corporations, such, for instance, as turnpike, canal, or even manufacturing corporations. To banks are confided the funds of other persons, and their relations to the public are those of the greatest confidence and trust. Then, the assets of a bank are in such a form that they may be readily misappropriated, and present extraordinary temptations to the persons who have them under their immediate control. The general test is the same in all cases, viz., that care which men of common prudence and diligence would exercise under similar circumstances, but it is quite plain that a prudent man would

[40] Briggs *v.* Spaulding, 141 U. S., 132.

[41] Briggs *v.* Spaulding, 141 U. S., 132. Bank directors, being only gratuitous mandataries, are liable only for fraud, or for such gross negligence as amounts to fraud. Swentzel *v.* Penn. Bank, 147 Pa. St., 140. Directors of a bank are not liable for allowing debts due the bank to become barred by the statute of limitations, unless they are solvent assets. Wallace *v.* Lincoln Sav. Bank, 89 Tenn., 630.

bestow a higher degree of care and more attention upon the affairs of a bank than he would upon the affairs of a corporation the property of which is not so easily misapplied and the business of which does not need such constant supervision.

Must Exercise Ordinary Skill and Judgment.—The directors must also exercise ordinary skill and judgment.[42] In the case of Hun *v.* Cary[43] it was said: "Like a mandatary, to whom he has been likened, he [a director] is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director and invites confidence in that relation, undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously." [44]

[42] Hun *v.* Cary, 82 N. Y., 65; Williams *v.* McKay, 40 N. J. Eq., 197. There are judicial dicta to the effect that directors are not liable for a mistake of judgment, however gross, provided the mistake is honest and the acts are fairly within the scope of the powers and discretion confided to the managing body. But the rule stated in the text is thought to be the better one; certainly it is the safest for the directors to adopt as their guide.

[43] 82 N. Y., 65.

[44] This case affords an excellent illustration of what will amount to a failure to exercise reasonable skill and judgment. The assets of the bank at the time of the action complained of amounted to something less than $70,000 (the amount due to the depositors), and the bank was in fact insolvent. But the trustees, with a view to improving the financial condition of the

May Commit Immediate Management to Executive Officers.—As a general rule, the directors are not deemed guilty of negligence when they commit the immediate management of the affairs of the bank to the principal executive officers. It is not expected that the directors will devote their whole time and attention to the bank's business and guard it from injury by constant superintendence. Moreover, they are commonly persons who are not professional bankers, and whose acquaintance with the banking business is limited; and in order to insure the success of the institution, they must, in a large measure, intrust the conduct of its affairs to officers known to possess the requisite knowledge and skill. A high degree of care in the selection of the officers is, of course, necessary; but after officers known to be competent and skillful have been chosen, the directors may trust them

institution by increasing its deposits, purchased a lot for $29,250, and agreed to erect a building thereon at a cost of $27,000, it being thought that an imposing building would be a good advertisement of the bank, and by attracting attention an inspiring confidence would draw deposits. A receiver was subsequently appointed, and at the time of his apppointment this lot, and other assets which produced less than $1,000, constituted the whole property of the bank; and afterward the lot and building were lost by a mortgage foreclosure. The action was brought to recover from the trustees the damages caused by the improper investment of the funds of the bank. There was no question but that the trustees were honest in their intention; the sole point was whether under the circumstances the purchase was such as the trustees, in the exercise of ordinary prudence, skill, and care, could make; and it was held that the findings of the jury against them ought to be sustained.

One of the points made by the defense was that the price agreed on was not more than the lot was worth at the time of the purchase. But in reply to this the court said: "It matters not that the trustees purchased this lot for no more than a fair value, and that the loss was occasioned by the subsequent general decline in the value of real estate. They had no right to expose their bank to the hazard of such a decline. If the purchase was an improper one when made, it matters not that the loss came from the unavoidable fall in the value of the real estate purchased. The jury may have found that it was grossly careless for the trustees to lock up the funds in their charge in such an investment, where they could not be reached in any emergency which was likely to arise in the affairs of the crippled bank."

with the immediate management and control. Still it is not to be understood that they may turn over to such officers the absolute direction of the entire business. It is their duty to exercise a general control and supervision, and they are not at liberty to leave the custody, control and management of the bank's securities and property to a single officer, no matter how high may be his character and reputation, for a long space of time without supervision, examination or inquiry.[45] And circumstances may arise which will impose upon them a high degree of care. Thus, if they become acquainted with any fact calculated to put prudent men on their guard—as that the officers are violating the law, are making injudicious loans, or are misappropriating the funds of the bank—a degree of care commensurate with the evil to be avoided is due from them; and a failure to bestow such care will be considered gross negligence, for which they may be made individually responsible.

This appears to be the rule established by the most authoritative decisions, some of which are cited in the note.[46] The general rule is the same whether the bank is a State bank or a National bank.[47]

Liability for Violaton of Law.—Independently of any statutory provision, the directors will be liable for losses resulting to the bank by reason of their violation of the laws by which the bank is governed. Thus, they will be

[45] Ouderkirk *v.* Central Nat'l Bank, 119 N. Y., 263, 272. In Briggs *v.* Spaulding (141 U. S., 132), it was held by the Supreme Court of the United States that the directors of a National bank are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, and they will not be permitted to be shielded from liability because of ignorance of wrong-doing, if such ignorance is the result of gross inattention.

[46] Briggs *v.* Spaulding, 141 U. S., 132; Percy *v.* Millaudon, 8 Martin (N. S.), 68; Ackerman *v.* Halsey, 37 N. J. Eq., 356; Williams *v.* Halliard, 38 N. J. Eq., 373; Dunn's Adm'r *v.* Kyle's Ex'r, 14 Bush., 134; Movius *v.* Lee, 30 Fed. Rep., 298; Wallace *v.* Lincoln Sav. Bank, 89 Tenn., 630.

[47] Swentzel *v.* Penn Bank, 147 Penn. St., 140.

liable if they invest the bank's funds in securities of a kind that the law does not permit the bank to make loans upon.[48] So, the directors of a National bank will be required to make good any loss occasioned by their violation of the provision limiting the amount of loans to one person to one-tenth of the capital stock.[49] And in such cases it is not essential, in order to charge them with liability, to show that they acted fraudulently or that they derived any benefit from the violation of law; it is sufficient that there was a culpable lack of prudence or failure to exercise with ordinary care their functions as *quasi* trustees of the funds of the bank by reason of which loss was sustained.[50] But this liability will not extend to directors who did not authorize or participate in the making of such loans.[51]

This liability exists at common law, and may be enforced, although the statute under which the bank is organized imposes no penalty or liability upon the directors for its violation.[52]

The liability of a director of a National bank for losses sustained by the bank through violations of the law by the directors is not terminated by the death of the director, but survives against his estate,[53] and his estate is liable, though the loss is not discovered until after his death, and after the appointment of a receiver for the bank.[54]

Statutory Liability.—Most of the banking laws contain provisions which impose a personal liability upon directors who violate, or permit the officers to violate, any of the statutory provisions intended to insure the safety of the bank. The National Bank Act provides that every

[48] Williams *v.* McDonald, 42 N. J. Eq., 392.
[49] Witters *v.* Sowles, 31 Fed. Rep., 1.
[50] Williams *v.* McDonald, *supra.*
[51] Witters *v.* Sowles, 31 Fed. Rep., 1; Williams *v.* McDonald, 42 N. J. Eq., 392.
[52] Thompson *v.* Greeley, 107 Mo., 557.
[53] Stephens *v.* Overstolz, 43 Fed. Rep., 465.
[54] *Id.*

director who participates in, or assents to, such a violation shall be held liable in his personal capacity for all damages which the bank, its shareholders, or any other person shall have sustained in consequence of such violation.[55] Construing this section, the Supreme Court of the United States has held that it affords the exclusive rule by which to measure the right to recover damages from directors, based upon a loss alleged to have resulted from their violation of any duty expressly imposed upon them by the National Bank Act, and that therefore, in cases of this character, a director is not liable unless he either participated in the violation or assented thereto.[56] The court said: "The frustration of the public policy embodied in the National bank system, by the crippling of the usefulness of such institutions, which would result from holding that directors in performing the duties imposed upon them by the National Bank Act might be held civilly liable, not by the standard of conduct which the act provides for a violation of its express commands, but by another and different one, is apparent. Under such a conception it might well be that prudent and responsible persons would decline to assume the discharge of the duties imposed by the statute because of the hazard of an uncertain pecuniary liability which the statute imposing the duty did not contemplate."

Attesting Reports—Liability to Persons Misled Thereby.—The National Bank Act requires that the reports made to the Comptroller shall be "attested by the signatures of at least three directors.[57] The word "attest" as used in the statute means something more than to witness the execution of the report by the president or cashier; it means to certify to the correctness of the report.[58] In a number of cases in the State courts it was held that where the

[55] Rev. Stat. U. S., 5239.
[56] Yates *v.* Jones Nat. Bank, 206 U. S., 158.
[57] Rev. Stat. U. S. Sec. 5211.
[58] Gerner *v.* Mosher, 58 Neb., 135.

directors attested a false report of the bank's condition they would be liable to any person deceived to his injury thereby, and that it was not material whether or not they knew the report to be false.[59] But all these cases were overruled by the Supreme Court of the United States in Yates *v.* Jones National Bank,[60] where it was held that the rule adopted was more rigorous than the National Bank Act warranted. The court said: "The civil liability of National bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the National Bank Act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principle that where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed in the statute is the exclusive test of liability. Farmers' & M. Nat. Bank *v.* Dearing, 91 U. S., 29, 35 and cases cited. The error in the decision below becomes at once apparent when its correctness is tested by the rule that the statute is applicable and prescribes the exclusive test of liability. The doctrine, as we have seen, upon which the court below rested its judgment was that directors of a National bank who merely negligently participated in or assented to the making and publishing of an untrue official report of the condition of the bank were civilly liable to any one deceived to his injury by such report. Indeed, in one respect, the ruling below went further than this, since it was, in substance, decided that despite the exercise of diligence by the director, if he attested an untrue report he was civilly liable because he did so at his risk, since it was his duty to know or to refrain from acting. That this imposed a higher standard of conduct than was required by the statute is obvious, but is clearly also established by previous decisions of this

[59] Yates *v.* Jones Nat. Bank, 74 Neb., 734; Gerner *v.* Mosher, 58 Neb., 135; Gerner *v.* Yates, 61 Neb., 100; Smalley *v.* McGraw, 148 Mich., 384.

[60] 206 U. S., 158.

court, pointing out that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required—that is, that the violation must in effect be intentional."

Liability to Depositors.—It has been held by the United States Circuit Court of Appeals that the depositors in a National bank may maintain an action against the directors to recover for losses caused by the negligent performance of their duties as such directors. The theory of this liability is, that there is a breach of the implied contract with the depositors inherent in the contract of deposit, that such deposits, and the other assets of the institution, will be used in conformity with the safeguards provided by law.[61] Where a number of depositors are affected by

[61] Boyd *v.* Schneider, 131 Fed. Rep., 223. In this case the court said: "The relation of depositors to the bank, and so far as directors stand liable for the doings of the bank, the relation of the depositors to the directors, while that of debtor and creditor, is something more than the mere relation of debtor and creditor. The contract of deposit is a loan; but not a loan pure and simple. On the acceptance of the deposit, a promise is raised that the bank will repay it on demand, or at the time stipulated; and to that extent the transaction is a loan. But when this much is said, the whole contract is not stated. The parties deal with each other on a basis, not merely that of borrower and lender, but on the basis, that the party receiving the money is a bank, organized under the laws of the United States, and subject to the provisions of law, present and future, relating to the custody and disposition of the money deposited; and that the party loaning the money is a depositor, leaving his money with the bank on the faith that such provisions respecting the custody and disposition of the deposit will be observed. In legal effect, the depositor says, Here is my money; in consideration of its reception, and such interest as you pay, you can have its use; but only on this condition, that the use conforms to the safeguards provided by the law. The acceptance of money thus tendered implies that the bank and its directors, so far as they are responsible for the doings of the bank, agree to conform to the conditions named. The law governing the custody and disposition of deposits thus enters into and forms a part of the relation created between the parties. (Walker *v.* Whitehead, 16 Wall., 314); thereby creating direct privity of relation between the directors and the depositors."

the same acts of negligence, they may join in on suit against such directors.[62]

Receipt of Deposits when Bank is Insolvent.—In many of the States statutes have been enacted making it a criminal offense for any officer or director of a bank to receive deposits when the bank is insolvent, and some courts held that the State statute applied to the officers and directors of National bank located within the State.[63] But these decisions were overruled by the Supreme Court of the United States in Easton *v.* State of Iowa,[64] where it was held that Congress, having provided a symmetrical and complete scheme for the banks to be organized under the National Bank Act, the provisions of that law were not to be supplemented by State legislation, and that it

[62] *Id.*

[63] State *v.* Easton, 113 Iowa, 516; State *v.* Bardwell, 72 Miss., 535.

[64] 188 U. S., 220. The court said: "Nor can we concede that by such legislation of a State, as was attempted in this instance, the affairs of a national bank, or the security of its creditors, would be advantageously affected. The provision of the State statute is express that it is the duty of the officers of the bank, when they know it is insolvent, to at once suspend its active operations; for it is obvious, that to refuse to accept deposits would be equivalent to a cessation of business. Whether a bank is or is not actually insolvent may be, often, a question hard to answer. There may be good reason to believe that, though temporarily embarrassed, the bank's affairs may take a fortunate turn. Some of the assets that cannot at once be converted into money may be of a character to justify the expectation that, if actual and open insolvency be avoided, they may be ultimately collectible, and thus the ruin of the bank and its creditors be prevented. McDonald *v.* Chemical Nat. Bank, 174 U. S. 610. But under the State statute, no such conservation action can be followed by the officers of the bank except at the risk of the penalties of fine and imprisonment. In such a case the provisions of the Federal statute would permit the Comptroller to withhold closing the bank and to give an opportunity to escape final insolvency. It would seem that such an exercise of discretion on the part of the Comptroller would, in many cases, be better for all concerned than the unyielding course of action prescribed by the State law. However, it is not our province to vindicate the policy of the Federal statute, but to declare that it cannot be overridden by the policy of the State."

is not competent for State legislatures to interfere, whether with friendly or unfriendly intentions.

Action Against Directors—How Brought.—An action to recover damages from directors of a National bank for loss from violation of law may be brought, though the Comptroller of the Currency has not procured a forfeiture of the charter.[65] Where a receiver has been appointed for the bank, the action should be brought by him; for the personal liability of the officers and directors is an asset of the bank belonging equally to all creditors, and must therefore be enforced by the receiver for their benefit in proportion to the amount of their claims; and the action cannot be brought by a creditor.[66] But where the receiver refuses to bring an action against negligent directors to recover the amount which the shareholders have been compelled to contribute to pay the debts of the association, an action against such directors may be brought by a shareholder on behalf of himself and the other shareholders.[67] And where the receiver is a director, and one of the parties charged with misconduct and against whom a remedy is sought, the action may be brought by a shareholder on behalf of himself and the other shareholders.[68] Such an action may be brought in a State court.[69] It must be brought by such shareholder on behalf of himself and all the other stockholders; the bank must be a party; the judgment must be in its favor, and the proceeds of such judgment will inure to the common benefit of all the shareholders alike.[70] But a stockholder cannot bring an

[65] Allen *v.* Luke, 141 Fed. Rep., 694; Stephens *v.* Overstolz, 43 Fed. Rep. 465. But see Welles *v.* Graves, 41 Fed. Rep., 459.

[66] Boyd *v.* Schneider, 124 Fed. Rep., 239; Bailey *v.* Mosher, 63 Fed. Rep., 488; Exchange Bank *v.* Peters, 45 Fed. Rep., 13; nor by the individual stockholders, Howe *v.* Barney, 45 Fed. Rep., 668.

[67] Nelson *v.* Burrows, 9 Abb. N. C., 280; Zinn *v.* Baxter, 65 Ohio St., 341.

[68] Brinkerhoff *v.* Bostwick, 88 N. Y., 52.

[69] *Id.*

[70] Zinn *v.* Baxter, 65 Ohio St., 341.

action against the directors for losses caused by their negligence, unless he was a stockholder when the acts complained of were committed, and also is such when the action is brought."

" Hanna *v.* Lyon, 179 N. Y., 107.

THE PRESIDENT.

Powers.—The president[1] is the presiding officer of the board, and it is his duty to preside at all meetings of the board. In most banks he is the chief executive officer, but his powers in this respect are not inherent in the office of president, but are either expressly conferred by the by-laws or by the board, or are exercised with the tacit consent of the board. It is impossible, therefore, to enumerate any powers pertaining to the office of president, because these depend in all instances upon the circumstances of the case. His powers may range all the way from those of a mere director to those of head officer and general manager of the bank, having authority to represent it in all matters of business as fully as the board itself.[2] The only power which has been held to be in-

[1] The abbreviation "Pres." is of such common use that when affixed to the name of an officer of a bank courts will take judicial notice that it designates the president; and oral evidence that the abbreviation "Pt." has the same significance is competent. Griffin *v.* Erskine, 131 Iowa, 444.

[2] In Boyd's Exr. *v.* First Nat. Bank (128 Ky., 468, 473), the Court of Appeals of Kentucky said: "We are aware that the active management of the monetry affairs of banks is ordinarily intrusted to the cashier. If the president receives only a nominal salary, and is expected to devote only a portion of his time to the business of the bank, he will not possess all the authority of the cashier. He may, however, be authorized by the directors to do anything within the authority of the bank's charter, and the modern tendency, and probably prevailing custom, in banking is to make the president the active manager, as well as the responsible head, of all the affairs of the bank, subject to the control of the directors; and because of the extraordinary responsibility thus placed upon them, bank presidents are paid large and remunerative salaries. Owing to the diversity of opinion expressed by the courts of last resort of the several States as to the authority appertaining to the offices of president and

herent in the office—except the right to preside—is the right to institute suits in behalf of the bank, and to employ counsel.[3] But even this power has been denied by at least one court.[4] There is no power inherent in the office to bind the bank by the execution of a note in its name,[5]

cashier, it is sometimes difficult to determine their respective powers and duties."

In State *ex rel* Carroll *v.* Bank (139 Iowa, 338, 344), it was said: "La Rue, though president, was the chief executive officer of the Corning Bank, and the Des Moines Bank had the right to rely upon him as representing his bank in negotiating the paper. It may be that he appropriated the proceeds of these notes (probably he did); but that was not the lookout of the Des Moines Bank. It dealt with him as an officer and representative of the Corning Bank as it had the right to do, and without notice of any want of fidelity in the discharge of his duties, as its executive officer. Having armed him with apparent authority to represent it in its corporate functions, the bank, or the receiver standing in its shoes, cannot be heard to complaint as against those who, in good faith and without notice, dealt with him as its representative."

[3] Hodges' Exr. *v.* First Nat. Bank, 22 Gratt, 58; First Nat. Bank *v.* Kimberlands, 16 W. Va., 555; National Bank *v.* Berry, 53 Kans., 696; Russell *v.* Washington Savings Bank, 23 App. D. C., 398. The president, in the exercise of his inherent powers to take charge of the litigation of the bank, may assign a judgment in favor of the bank to a trustee for the purpose of collection, and to the end that the latter may maintain an action thereon in connection with a judgment against the same debtor assigned to him by another creditor. Guernsey *v.* Coal and Mining Co., 99 Iowa, 471.

[4] Pacific Bank *v.* Stone, 121 Cal., 208-209. In this case the court said: "We do not doubt but the authority to employ an attorney may be given to the president orally or without formal resolution by the directors, or that, where he has employed an attorney without such or any authority, the directors may orally or by conduct ratify or sanction such employment; nor do we doubt that the president may be clothed with such general management of the affairs of the corporation by resolution or by-laws of the directors, or by their acquiescence or consent, as would raise a presumption of authority to act in a particular case where such proofs were made. But in the absence of all evidence of authority to employ an attorney, as was the case here, and, in the absence of all evidence of subsequent consent or ratification, we must hold that the contract sued upon was unauthorized, and in an action bases thereon he cannot recover."

[5] Nat'l Bank of Commerce *v.* Atkinson, 55 Fed. Rep., 465.

nor make a contract binding on the bank to compensate one for obtaining deposits for the bank,[6] nor agree that sureties on paper given to the bank will not be held liable thereon,[7] nor release a claim held by the bank,[8] nor sell and assign a note held by it,[9] nor purchase bonds and stocks for it,[10] nor compromise a debt to it from an insolvent firm.[11] But powers of this character may be conferred upon him by the board of directors, either expressly, by resolution to that effect, by subsequent resolution, or by acquiescence in transactions of a similar nature, and of which the directors have knowledge.[12]

Who Eligible to Office of President—Whom Chosen—Term of Office—Salary.—The banking laws usually require that the president shall be a director of the bank. The provision of the National Bank Act upon the subject is, "One of the directors to be chosen by the board shall be the president of the board."[13] He is elected by the directors and not by the stockholders. The ordinary procedure is for the new board to convene shortly after the annual meeting of the stockholders, and choose a president and other officers. There is no fixed term of office, and the directors have the right to remove the president at

[6] Tifft *v.* Quaker City Nat'l Bank, 8 Pa. Co. Ct., 606.

[7] First Nat'l Bank *v.* Bennett, 33 Mich., 520; Bank of U. S. *v.* Dunn, 6 Peters, 51; Bank of Metropolis *v.* Jones, 8 Peters, 12. But see Cake *v.* Pottsville Bank, 116 Penn. St., 264.

[8] Only *v.* Chadcey, 7 R. I., 224; Hodges' Executor *v.* First Nat'l Bank, 22 Gratt, 51.

[9] Hollowell, etc., Bank *v.* Hamlin, 14 Mass., 178.

[10] First Nat'l Bank *v.* Hock, 89 Penn. St., 324.

[11] Wheat *v.* Bank of Louisville (Ky.), 5 S. W. Rep., 305.

[12] An offer of a reward by a bank president for information leading to the arrest of a defaulter will be binding upon the bank, in the absence of proof that the president had exceeded his authority as limited by provision of by-laws adopted by the bank. Bank of Minneapolis *v.* Griffin, 168 Ill., 314.

[13] Rev. Stat. U. S., 5150.

any time.[14] The president is usually paid a salary, but when a salary is voted him, he may not take part in the proceedings, nor may such a salary be voted at a meeting where his vote is necessary to the adoption of the resolution.[15]

[14] Taylor *v.* Hutton, 43 Barb., 195.

[15] Wickersham *v.* Crittenden, 93 Cal., 71. Without authority from the directors, the officers of a bank cannot allow one to draw checks on the bank for a debt due to him from the president individually. Dowd *v.* Stephenson, 105 N. C., 467.

THE CASHIER

The cashier is the executive financial officer of the bank. It is by him or under his direction that its moneys are received and paid out, its debts collected and paid, and its commercial securities received or transferred. And although some of these duties may be performed by tellers and other subordinate officers, these act under his direction and are merely the instruments by which designated portions of his various functions are performed. The ordinary duties of the cashier have been defined by the Supreme Court of the United States as follows: "His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and as the executive officer of the bank transacts most of its business."[1]

Power to Indorse and Transfer Securities.—As the chief financial officer and agent of the bank the cashier has *virtute officii* the power to indorse and transfer negotiable securities belonging to the bank, and no special authority for this purpose is required.[2] And he is the only officer

[1] United States *v.* City Bank of Columbus, 21 How., 356. See also Merchants' Bank *v.* State Bank, 10 Wall., 604; Matthews *v.* Mass. Nat'l Bank, 1 Holmes, 396; Cochecho Nat'l Bank *v.* Haskell, 51 N. H., 116.

[2] Fleckner *v.* Bank of United States, 8 Wheat., 338; Wild *v.* Passamaquoddy Bank, 3 Mason, 505; City Bank *v.* Perkins, 29 N. Y., 554.

of the bank who has authority *ex officio* to perform this duty,[3] as he has the power to bind the bank by his indorsement the bank is not relieved from liability as indorser of by reason of the cashier's fraud, unless the endorser has notice of such fraud.[4]

Power Not Affected by Statutes.—Provisions in bank charters and banking statutes to the effect that the contracts and engagements of the bank shall be signed by some other designated officer of the bank as well as by the cashier have uniformly been held not to comprehend the drawing and indorsing of commercial paper. A bank charter provided "that all bills, bonds and notes and every other contract or engagement on behalf of the corporation shall be signed by the president and countersigned by the cashier; and the funds of the corporation shall in no case be liable for any contract or engagement unless the same shall be signed and countersigned as aforesaid." This provision was held by the Supreme Court of the United States not to apply to a check drawn upon another bank; and, accordingly, the bank was made liable on a check signed only by the cashier.[5] A similar construction has been placed by the New York courts upon the provisions of the general banking law of that State that "*contracts* made by any association, and all notes and bills by them issued and put in circulation as money, shall be signed by the president or vice-president and cashier thereof."[6] In Barnes *v.* Ontario Bank Allen, J., discussing this question, said: "The whole business of a bank is confided in the first instance to a board of directors, and they usually confer the power to transact its most important and daily financial operations to their cashier and teller. The cashier is usually intrusted with all the funds of a bank.

[3] Smith *v.* Lawson, 18 W. Va., 212.
[4] Auton *v.* Manistee Nat. Bank, 67 Ark., 243.
[5] Mechanics' Bank *v.* Bank of Columbia, 5 Wheat., 326.
[6] Safford *v.* Wyckoff, 4 Hill, 442; Barnes *v.* Ontario Bank, 19 N. Y., 152.

He receives directly all moneys and notes. He delivers up all discounted notes on payment. He draws checks and drafts, and, in short, is the executive officer through whom and by whom the whole moneyed operations of the bank, in paying or receiving debts or discharging them, are to be conducted. It is his duty to apply the negotiable funds as well as the money of the bank to the payment of its debts. In receiving deposits did the Legislature ever contemplate that the depositor must wait for the president or vice-president to sign with the cashier a mere certificate or acknowledgment of the money by the cashier? The answer to this question is to me plain and conclusive. The power to receive must be a power to acknowledge the reception, and one follows as a necessary incident to the other." Like statutes in Illinois,[7] Indiana,[8] Wisconsin,[9] and North Carolina[10] have received the same construction. And in Georgia it was held that a provision in a bank charter to the effect that all contracts and engagements of the bank should be signed by the president and countersigned by the cashier could not have been intended to apply to those contracts which according to commercial law and usage appertain to the office of cashier, such as drawing or indorsing bills of exchange, checks and drafts.[11]

Can Transfer Only Negotiable Securities and in Ordinary Course of Business.—But the cashier's power to transfer extends only to transfers of the negotiable securities of the bank made in the ordinary course of business. He has no inherent authority to sell or dispose of the non-negotiable property of the bank, as, for instance, mortgages held by it.[12] And his indorsement and transfer of negotiable securities will not be binding upon the bank unless

[7] State Bank *v.* Kain, 1 Breese, 45.
[8] Jones *v.* Hawkins, 17 Ind., 550.
[9] Rockwell *v.* Elkhorn Bank, 13 Wis., 731.
[10] State Bank *v.* Locke, 4 Dev., 533.
[11] Merchants' Bank *v.* Central Bank, 1 Kelly, 430.
[12] Hoyt *v.* Thompson, 5 N. Y., 320; Leggett *v.* N. J. Man. Co., Sax. Ch., 542; Holt *v.* Bacon, 25 Miss., 567.

made in the usual course of business. Thus, it has been held that the cashier could not pledge the securities of the bank for the payment of antecedent debts.[13] So, where a cashier, when his bank was insolvent and was about to close its doors, transferred some of its bills receivable to a customer in part payment of his deposit, it was held that the cashier in so doing was acting in excess of his authority.[14]

Drawing or Indorsing Paper as "Cashier."—When paper is drawn or indorsed in the name of an individual, with the addition of the word "cashier," but without any bank being specified, parol evidence is admissible to show that when the paper was made or transferred such person was the cashier of the bank by which or through which title to the paper is claimed, and that in signing or indorsing the paper he was acting as the agent of such bank.[15] In the case of Bank of Genesee v. Patchin Bank,[16] S. B. Stokes, the cashier of the Patchin Bank, sent to the Bank of Genesee to be discounted a bill of exchange payable to the order of "S. B. Stokes, Cas.," indorsed by him with the same addition to his signature and inclosed in a letter dated at the banking-house and signed "S. B. Stokes, Cas." It was held that these circumstances imported that the indorsement was that of the Patchin Bank in the regular course of business, and not that of S. B. Stokes individually. Denio, J., said: "The question was whether the indorsement of Stokes was private or official. In the absence of any evidence to connect the bill with the defendant's bank, he would be regarded as the payee and the indorser individually, and the abbreviation affixed to his name would be considered as a *descriptio personæ*. But when it has been shown that he was the defendant's cashier, the presumption would be that a note payable in

[13] State Bank *v.* Davis, 50 How. Pr., 447.
[14] Lamb *v.* Cecil, 28 W. Va., 653.
[15] Baldwin *v.* Bank of Newbury, 1 Wall., 234.
[16] 19 N. Y., 312.

that form was the property of the bank." Likewise, in Bank of New York *v.* Bank of Ohio[17] it was held that a draft drawn payable to the order of "D. C. Converse, Esq., Cashier," who was the cashier of the defendant, was to be regarded as payable to the bank of which he was such officer.

The action upon such a note or draft may be brought by the bank, alleging either that the promise was made to the cashier for it or that the cashier's name was used by adoption for that of the bank.[18]

Or the cashier may indorse the paper to himself and maintain the action in his individual name.[19]

A mortgage to the cashier of a bank in his own name for a debt due the bank, pursuant to a *bona-fide* agreement between the debtor and the bank, is a valid security in favor of the bank.[20]

Power to Certify Checks.—Another power which pertains to the office of cashier is that of certifying checks. This power is incidental to his authority to receive the deposits of customers and make payment to them.[21] In Cooke *v.* State National Bank, Church, C. J., said: "The cashier has a right, by virtue of his office, to make this certificate when the drawer has funds. He is the custodian of the funds of the bank and of the books; he receives money and gives vouchers therefor; and whether upon receiving a check he pays it in money or gives the holder a certificate of deposit or draft, or a certificate that he will retain sufficient of the money standing to the drawer's credit to pay it when presented, he is in either case acting within

[17] 29 N. Y., 619. See also First Nat'l Bank of Angelica *v.* Hall, 44 N. Y., 395; Folger *v.* Chase, 18 Pick, 63.

[18] Darby *v.* Berney Nat'l Bank (Ala.), 11 So. Rep., 881; McGhee *v.* Importers', etc., Nat'l Bank, 93 Ala., 192; Edwin Lane Paper Co. *v.* Farmers' Nat'l Bank (Ind.), 30 N. E. Rep., 411.

[19] Young *v.* Hudson, 99 Mo., 102.

[20] Lawrenceville Cement Co. *v.* Parker, 15 N. Y. Sup., 577.

[21] Merchants' Bank *v.* State Bank, 10 Wall., 604; Cooke *v.* State Nat'l Bank, 52 N. Y., 96.

the line of his duty and within scope of the authority which necessarily attaches to his office."

In the larger banks this duty is usually performed by the paying teller. But the fact that the teller has been authorized to certify does not of itself affect the right of the cashier to do the same thing. For the teller acts under the direction of the cashier, and in this, as in other matters, is merely the instrument by which the cashier performs a part of the functions of his office.[22]

Power to Borrow Money.—The cashier, in virtue of his general employment, and without any special delegation of authority for the purpose, may borrow money for the bank. His power in this respect is a necessary incident to his duty, as financial agent of the bank, of paying its debts and meeting its obligations.[23] And having the power to borrow, he has necessarily the power to bind the bank for the repayment of the money, and to execute and deliver the necessary assurances or undertakings therefor in any form not forbidden by law.[24] He may also secure notes

[22] Merchants' Bank *v.* State Bank, 10 Wall., 604. In Muth *v.* St. Louis Trust Co. (94 Mo. App., 107-108), it was said: "In support of the text in Morse on Banks and Banking, and of the American and English Encyclopedia of Law, that a teller by virtue of his position is authorized to certify checks, New York cases only are cited. The weight of authority undoubtedly is that the cashier of a bank has inherent authority to certify checks. Merchants' Bank *v.* State Bank, 10 Wall. (U. S.), 648; Martin *v.* Webb, 110 U. S., 7. Outside of the State of New York we have not been able to find any case holding that a teller has implied authority to certify checks. His powers seem to be limited to passing on the genuineness of signatures, to checks presented for payment and in paying out the money of the bank on checks. Such power seems to us to be denied to him in Walker *v.* St. Louis National Bank, 5 Mo. App. 1 c., 217, and we hold that the court did not err in refusing to certify the check in suit."

[23] Barnes *v.* Ontario Bank, 19 N. Y., 152; Coats *v.* Donnell, 94 N. Y., 168; Donnell *v.* Lewis Co. Savings Banks, 80 Mo., 165.

[24] See cases cited in the preceding note. "Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the powers necessary for such an officer in the transaction of the

executed by him by a pledge of paper belonging to the bank.[25]

No Authority to Receive Stocks and Bonds.—As a general rule, the cashier has no authority to receive anything but money in payment of debts due to the bank.[26] He has, for example, no authority to receive the stock of another corporation in satisfaction of a note held by the bank.[27]

legitimate business of banking. Thus, he is generally understood to have authority to indorse the commercial paper of his bank, and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has secured *bona fide* rediscount of the paper of the bank, his acts will be binding because of his implied power to transact such business." West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S., 557.

[25] Citizens Bank *v.* Bank of Woddy, 126 Ky., 169. In this case it was said: "Obviously a bank cashier has authority, when he finds his cash running low at the close of a day's business, to borrow cash from another bank upon collateral to make ends meet; and, if he forsees that he may get in this condition, he may make such a loan in advance."

[26] First Nat'l Bank of Lineville *v.* Alexander, 152 Ala., 585.

[27] Bank of Commerce *v.* Hart, 39 Neb., 197, 201. In this case, the court said: "The cashier of the Bank of Commerce, then, as the executive officer of the bank, was clothed with authority to collect all debts due the bank, but this means collections in money. If a cashier may discharge the debts due his bank by exchanging the evidences of them for stocks of an insurance company or a gas company, then he can, under the name and charter of the bank, conduct an entirely different business, and use the funds of his stockholders for a purpose for which they were never subscribed and in violation of the law of the bank's creation. The purposes for which the Bank of Commerce was organized, as expressed in its articles of incorporation, were to received deposits of money and pay the same out on paper vouchers; to loan money on personal security; to issue drafts or letters of credit; to buy and sell securities of every kind, and do a general banking business. Had this charter expressly provided that the corporation might invest its funds in stocks of insurance companies and deal generally in stocks of other corporations, such a provision would have been contrary to the laws of the State and void. But there is no provision in the bank's charter which by any reasonable construction can be construed into an authority to purchase and hold the stocks of any other corporation. True, it says, 'to purchase securities of every kind,' but certificates of stock are not securities within the meaning of this provision, nor such as the word im-

When Dealing For Himself.—The rule that a cashier may bind the bank by certain acts inherent in his office does not permit him to do so where he is acting in his own business, and this fact is known to the person dealing with him; and upon proof that such other person knew that the transaction was personal to the cashier, and not for the bank, will cast upon that person the burden of showing that the act of the cashier was authorized by the directors or ratified by them.[28] Thus, where a cashier issues a cashier's check to his own order, or certifies his own check, and uses the same in payment of his individual debt, the creditor taking such check does so at the risk of his lack of authority.[29]

Power to Receive Paper for Collection—Receipt of Collateral.—The power to receive paper for collection is inherent in the office of cashier, and requires no special authorization from the directors.[30] And this power necessarily carries with it authority to receive collaterals ac-

ports in commercial or banking phraseology. 'Securities,' as here used, mean notes, bills of exchange, and bonds; in other words, evidences of debt, promises to pay money. We conclude, therefore, that the cashier, by virtue of his office, had not the power to accept the stock of the insurance company in payment of the debt due the bank, but that power, if it existed, was lodged in the directory, and as it had not expressly authorized the cashier thereto, he exceeded his powers in agreeing to accept, on behalf of his principal, the insurance company stock in payment of the debt due from Hart to the bank, and that the latter is not bound thereby."

[28] Campbell *v.* Manufacturers' Nat'l Bank, 67 N. J. Law, 301.

[29] Gale v. Chase Nat'l Bank, 104 Fed. Rep., 214. Under the Negotiable Instruments law it is competent for a bona fide holder, without notice, in suing on a certificate of deposit payable to the cashier of a bank and by him as cashier indorsed to plaintiff, to show that the indorser was in fact cashier of the bank, and was acting in that general capacity in transferring the instrument; but it is not competent for the bank to show as against such bona fide holder that he was making use of his official title and authority in his individual interest. Johnson *v.* Buffalo Central Bank, 134 Iowa, 731.

[30] First Nat'l Bank of Birmingham *v.* First Nat'l Bank of Newport, 116 Ala., 520, 532.

companying the paper, and given to secure its payment, which are to be delivered to the debtor when he takes up the paper.[31]

Power to Enforce Collections.—As the cashier is the collecting officer of the bank, he may bring suit upon paper due the bank.[32] So, he may enter into contracts looking to the collection of debts due the bank, and, if the necessity arises, may bind the bank to pay reasonable collection fees.[33] Thus, where the foreclosure of a mortgage held by the bank, and the sale of the land under the mortgage, are necessary steps in the collection of a debt due the bank, the cashier may bind the bank by an agreement to pay a commission to another for his aid in the business.[34]

Contracts of Suretyship—Accommodation Indorsements.—It often happens that banks are asked by their customers to become sureties for them in one way or another, as, for example, by executing attachment bonds; but unless the bank has some interest of its own in the matter, such bonds are in excess of its powers, and neither the cashier nor any other officer has authority to bind the bank thereby.[35] Nor has the cashier authority to bind the bank by an accommodation indorsement or guaranty.[36]

[31] *Id.* In this case it was said: "It follows that if one, relying on the general usage and custom of banks, and having no knowledge or notice of any limitation upon the authority of the cashier of a particular bank, known to be engaged in doing a general banking business, should deliver to such cashier, at his regular place of business, a note or bill for collection, together with collaterals given to secure said note or bill, the bank could not afterwards claim that the act of the cashier in receiving the same was his individual act and not that of the bank."

[32] Young *v.* Hudson, 99 Mo., 102.

[33] National Bank *v.* Ratliff, 33 Tex. Civ. App., 279.

[34] *Id.* The cashier may take a book account in payment of a debt due the bank. Bank *v.* Dick, 73 Mo. App., 354.

[35] Sturdevant Bros. *v.* Farmers' & Merchants' Bank, 69 Neb., 221.

[36] Dry Goods Co. *v.* Bank, 81 Mo. App., 46.

Restriction of Powers Does not Affect Third Persons Without Notice.—The directors may, of course, restrict the powers of the cashier if they see fit; but persons dealing with the bank in good faith have the right to presume that the cashier has the customary authority of such an officer, and they will not be affected by any limitation of his powers unless they have notice thereof.[37] Thus, persons dealing with him may assume that he is authorized to indorse and transfer the negotiable securities of the bank for its use, and any one taking commercial paper transferred by him, without notice of any restriction upon his authority in this respect, will have a good title thereto as against the bank.[38]

Powers are Limited.—But the powers which the cashier may exercise *virtue officii* are only such as naturally pertain to the ordinary financial operations of the bank. Accordingly, it has been held that he cannot bind the bank by his assurance to a person about to indorse a note that such person will incur no risk or responsibility by reason of such indorsement.[39]

So, he has no power to release a surety from liability upon paper owned by the bank.[40] So, his powers do not ex-

[37] Cooke *v.* State Nat'l Bank, 52 N. Y., 96; Loring *v.* Brodie, 134 Mass., 453.

[38] Bank of the State *v.* Wheeler, 21 Ind., 90.

[39] United States Bank *v.* Dunn, 6 Peters, 51. A personal agreement between the cashier of a bank and the maker of notes negotiated by him for the holder to carry their notes for a stipulated time does not affect the legal relations existing between the bank and such holder, whether it was known to the bank officers or not. Ellerbee *v.* Nat'l Exchange Bank (Mo.), 19 S. W. Rep., 241. Officers of banks have not the power to excuse or limit the legal obligations of persons to the banks they represent, by agreeing with them that they shall not be held liable or called upon to pay the obligations which they make, either as principal debtors or accommodation makers or indorsers, and on the credit of which the bank has parted with its funds. Thompson *v.* McKee, 5 Dak., 172, 179.

[40] Daviess County Savings Association *v.* Sailor, 63 Mo., 24; Ecker *v.* First Nat'l Bank, 59 Md., 291.

tend to indemnifying an officer for levying upon property.[41] Nor can he bind the bank by a contract for the purchase or sale of real estate,[42] or by the assignment or release of a mortgage,[43] or by a sale of the safe and fixtures of the bank,[44] or by a purchase of merchandise in the name of the bank, for the benefit of a third person,[45] or by a promise to pay a draft to be drawn on one of its customers, in anticipation that the customer will make a deposit of the amount of the draft with the bank.[46] Nor has he by virtue of his office any authority to accept the stock of another corporation in payment and discharge of a debt due to the bank.[47] In short, the only powers inherent in the office of cashier are those which are naturally connected with or incidental to the duty of receiving and paying out the money of the bank and taking charge of its funds and securities.[48] But acts of a cashier in behalf of the bank, not criminal or against public policy, though not strictly within his power, or the powers of the bank, done in the course of a transaction which has been executed in whole or in part can not be so repudiated by the bank, that it should enjoy the benefits and escape the liabilities of the transaction.[49]

[41] Watson *v.* Bennett, 12 Barb., 196.

[42] Winsor *v.* Lafayette County Bank, 18 Mo. App., 665.

[43] Martin *v.* Webb, 110 U. S., 7.

[44] Asher *v.* Sutton, 31 Kans., 286.

[45] North Star Boot & Shoe Company *v.* Stebbins (S. D.), 48 N. W. Rep., 833.

[46] Flanagan *v.* California Nat'l Bank, 56 Fed. Rep., 959.

[47] Bank of Commerce *v.* Hart, 39 Neb., 197.

[48] Where a banking corporation has the power to negotiate loans, the business of such negotiations falls within the line of duty and authority intrusted to the cashier as executive officer to whom the management and transaction of the ordinary business of the bank is intrusted. Birmingham Trust and Savings Co. *v.* Louisiana Nat'l Bank (Ala.), 13 So. Rep., 112.

[49] Owens *v.* Strapp, 32 Ill. App., 653. Where knowledge is acquired by a cashier in the course of his duties as such cashier, the bank will be affected thereby as to transactions forming a part of the same business had after his death by other officers of the bank. Birmingham Trust and Savings Co. *v.* Louisiana Nat'l Bank (Ala.), 13 So. Rep., 112. Where the cashier of a

Cannot Make Discounts.—The cashier has no authority to make discounts, or to bind the bank by contracts in reference thereto. This is a matter which requires the action of the board of directors, unless they have delegated the power to some sub-agency.[50]

Liable if He Transcends His Powers.—Without some authority to do so, either express or implied, he will be liable if he transcends the known powers of a cashier and loss results to the bank. Thus, where a cashier assumed to change the securities of the bank without the consent of the directors, his bondsmen were held liable for the loss thereby sustained by the bank.[51]

Though the action which occasions the loss is a tort, the tort may be waived, and an action of contract maintained against the cashier or his estate.[52]

Where he conceals the defalcation of another officer,

banking company negotiated for a stockholder therein a loan from another bank upon the security of his stock in such company, and made the collections upon the notes; *held*, that this was notice to the company of the prior lien of such bank upon such shares. (*Id.*) Where the cashier of a bank is dealing with it in his individual interest, the bank is not chargeable with his uncommunicated knowledge of facts derogatory to his title to the paper which is the subject of the transaction. Merchants' Nat'l Bank of Kansas City *v.* Lovitt (Mo.), 21 S. W. Rep., 825. The fact that the discount was calculated by the cashier offering the paper would not be material in such case. (*Id.*)

[50] Martin *v.* Webb, 110 U. S., 7; United States Bank *v.* Dunn, 6 Peters, 51. Where a bank cashier credits his personal creditor on the books of the bank with the amount of the debt due from himself, and no objection is made by the bank, the amount, if drawn out by the customer, cannot be recovered from him by the bank. But if such amount is not actually credited on the books, the bank may recover, although the officer informed the creditor that such credit had actually been given. Williams *v.* Dorrier, 135 Pa. St., 445. A loan by the president and cashier of a bank to the president or to a third person for his benefit, for an unusual term and without security, contrary to the usual custom of banking and without previous authority from the board of directors, is a misappropriation of the funds of the bank for which an action will lie. Wickersham *v.* Chittenden, 93 Cal., 17.

[51] Barrington *v.* Bank of Washington, 14 Sergt. & R., 405.

[52] Vance *v.* Mottley (Tenn.), 21 S. W. Rep., 593.

the statute of limitations will not begin to run in favor of himself or his estate until such defalcation is disclosed to the directors or stockholders.[53]

Cashier May Have Larger Powers.—We have been speaking of only those powers which ordinarily belong to the office of cashier, and which such an officer exercises merely *virtute officii*. But very often the cashier has much greater powers than these; in many instances he has almost the entire management of the bank, and exercises the powers of a general managing agent. That the directors may clothe him with such authority is unquestionable. Nor is it essential to his power to bind the bank in matters beyond the scope of his ordinary functions that the directors should have expressly conferred upon him such an authority.[54] "His authority may be by parol and collected from circumstance. It may be inferred from the general manner in which for a period sufficiently long to establish

[53] *Id.* In an action upon the bond of a cashier for conversion of stock of the bank transferred to him to be held for the bank as security for a loan made by it, it is no defence to the sureties on the bond that the transaction was in violation of Sec. 5137, Rev. Stat. U. S., which forbids National banks to make loans on the security of their own shares. Walden Nat'l Bank *v.* Birch, 130 N. Y., 221. Where the losses have all occurred because of his breach of duty as cashier, it is no defense to the sureties on his bond that his salary was increased in consideration that he would perform certain other duties. Wallace *v.* Exchange Bank of Spencer, 126 Ind., 265.

[54] Martin *v.* Webb, 110 U. S., 7; Scow *v.* Savings Bank, 136 Iowa, 1; Griffin *v.* Erskine, 131 Iowa, 444; City Bank of New Haven *v.* Perkins, 4 Bosw., 420; Caldwell *v.* Nat'l Mohawk Bank, 64 Barb., 333. In Steinke *v.* Yetzer, 108 Iowa, 512, 516, the court said: "The management of the bank's affairs was entrusted to the president and cashier. These officers, with the knowledge of the directors, had so executed deeds to other real estate belonging to the bank before this time. It was the usual course of business as sanctioned or ratified by the directors. The deeds were therefore not invalid on this account. The bank is bound by the acts of these officers, done according to custom and usage; and the third persons dealing with them under such circumstances, and having no knowledge of want of authority, are protected, even when authority is lacking."

a settled course of business he has been allowed without interference to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When during a series of years or in numerous business transactions he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations." [55]

In Wing *v.* Bank (103 Mich., 565, 576-577), the court said:

"The rule undoubtedly is that usually the authority of a cashier of a bank is a limited authority, and that a party seeking to show a release from a cashier from liability upon commercial paper held by the bank, except in the ordinary course, must show that the cashier had authority from the directorate, or that the act had been ratified or acquiesced in by the bank. That authority, however, may be shown expressly or by necessary implication, or it may be established by the particular usage, practice or mode of doing business of the bank. If a cashier be allowed to exercise general authority in respect to the business of the bank for a considerable time—in other words, if he is held out to the public as having authority in the premises—the bank is bound by his acts, as in the case of an agent of any other corporation, by whatever name he may be designated, in the same manner as if authority were expressly granted."

Must Exercise Reasonable Skill and Care.—In the performance of his duties as such officer the cashier is bound to the exercise of reasonable skill and ordinary care and diligence; and if, by reason of his failure to exercise such skill, care, or diligence, loss results to the bank, he and

[55] Per Harlan, J., in Martin *v.* Webb, 110 U. S., 7.

his bondsmen will be liable therefor.[56] And the usual condition of a cashier's bond that "he shall well and truly execute the duties of cashier" is violated by his neglect to use due skill and care, as well as by any fraudulent or dishonest act.[57] In Minor *v.* Mechanics' Bank Justice Story, delivering the opinion of the United States Supreme Court, said: "The condition that Minor shall 'well and truly execute the duties of cashier' of the bank is said to be merely a stipulation for honesty in the discharge of the duties, and not for skill, capacity, or diligence. We are of a different opinion. 'Well and truly to execute the duties of the office' includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently or unskilfully, if they are violated from want of capacity or want of care, they can never be said to be 'well and truly executed.' The operations of a bank require diligence, with fitness and capacity, as well as honesty, in its cashier; and the security for the faithful discharge of his duties would be utterly illusory if we are to narrow down its import to a guaranty against personal fraud only."

And where the condition of a cashier's bond was that he should well and truly perform the duties of cashier *to the best of his ability,* it was held by the Supreme Court of Pennsylvania that this was an undertaking that he would perform such duties with *competent skill and ability.*[58]

When Liable for Act or Neglect of Subordinate.—The cashier cannot be rendered liable for the wrongful or dishonest act of any of his subordinates unless his own neglect or collusion has caused or aided it.[59] As to how closely he must inspect the work of those under him will depend in

[56] Minor *v.* Mechanics' Bank, 1 Peters, 46; Commercial Bank *v.* Ten Eyck, 48 N. Y., 305.

[57] Minor *v.* Mechanics' Bank, *supra;* Barrington *v.* Bank of Washington, 14 Sergt. & R., 405.

[58] Barrington *v.* Bank of Washington, 14 Sergt. & R., 405.

[59] Batchelor *v.* Planters' Nat'l Bank of Louisville, 78 Ky., 435.

a great measure upon the amount of business done by the bank and the methods of transacting it. The duties of the cashier in this respect were very clearly set forth by the Court of Appeals of Kentucky in the case of Batchelor *v.* Planters' National Bank of Louisville. The court said, among other things: "The cashier is not an insurer of the honesty and fidelity of those who occupy subordinate positions in the bank; and while it is his duty to supervise and control the affairs of the bank and its officers under him in the discharge of their duties, he is required only to exercise that diligence in regard to the action of his subordinates consistent with the discharge of all his duties in connection with the bank, exercising that care and skill that is reasonable and practicable. He is not required to examine by actual inspection every original entry made by those under him, but his care extends to a general supervision of the books and affairs of the bank; and when it is shown that he has exercised such diligence as a prudent man would in the control of those under him and in the supervision of their work, he has discharged his duty."

The want of diligence on the part of the directors will not constitute a defense for a neglect of the cashier to exercise a proper supervision over a subordinate officer; and if he has himself been negligent, he and his sureties will be liable for the loss to the bank, though the directors might have discovered the fraud or defalcation of the subordinate, had they exercised reasonable diligence.[60]

When Liable for Permitting Overdrafts.—It is sometimes said that a cashier will be personally responsible whenever he allows customers to overdraw their accounts, and that even the fact that this is done with the sanction of the board of directors will not relieve the cashier or his sureties from liability for loss sustained by the bank by reason of such overdraft.[61] The case of Minor *v.* Me-

[60] Batchelor *v.* Planters' Nat'l Bank of Louisville, 78 Ky., 435.

[61] Market Street Bank *v.* Stumpe, 2 Mo. App., 540; Bank of St. Mary's *v.* Cader, 4 Strobhart (S. C.), 403.

chanics' Bank, decided by the United States Supreme Court in 1828 is cited as an authority for this view of the law, and the broad language used by Justice Story in that case does appear to go to that length.[62] But what was said by the court on that occasion must be taken, like all judicial utterances, with reference to the facts before the court. To say that a cashier is personally liable in all cases where he permits an overdraft is stating the law too broadly. His liability would appear to depend upon the circumstances of each case, and whether, from all the facts of the case, his action has been prudent, when regarded in the light of the common practice of banks in this respect.[63]

When Not Liable for Failure to Comply With By-Laws.—A cashier in the performance of his duties is, of course, bound to comply with the by-laws and other regulations established by the directors for the management of the affairs of the bank, and ordinarily he will be liable for any loss resulting to the bank from his failure to do so. But it will sometimes happen that such compliance is impracticable or, indeed, impossible. Thus, for instance, the by-laws may require him to consult other officers or certain committees before taking action in designated matters; but this he may be unable to do by reason of the absence of such other officer, or by reason of the failure of such committees to meet, and in such case clearly he ought not be held liable for failing to conform to the regulation, when he has otherwise acted in the business with due vigilance and prudence.[64] On this head it has been said by the Court of Appeals of New York: "To impose upon the cashier the duty of carrying on the business of a bank, and yet hold him responsible for a neglect of duty in not consulting officers and committees who apparently held no meetings and systematically absented

[62] Peters, 46.
[63] Commercial Bank *v.* Ten Eyck, 48 N. Y., 305. See page 45.
[64] Second Nat'l Bank *v.* Burt, 93 N. Y., 233.

themselves from the performance of their duties, is an imposition which the law will not tolerate. It would be quite impracticable for the managing officer of a bank required to keep it open daily to leave his place of business as each transaction requiring attention occurred to look up persons engaged in other employments and consult them in regard to such transactions."[65]

But though the bank has entirely failed to provide for such a committee this would not relieve the sureties on the cashier's bond from liability incurred by his fradulent misapplication of money belonging to the bank;[66] nor for losses occasioned by his undertaking to do things which he would not have had authority to do, had no committee been appointed, and which the committee could not give him authority to do.[67]

Where the cashier is required by the by-laws to consult a committee composed of the president, and a director to be designated, in all business of a certain nature, the failure to designate the director will not excuse the cashier from consulting the president in regard to matters of business of the nature of that in regard to which the committee were to be consulted.[68]

Sanction of Directors Will Not Excuse Violation of Duty.—Any violation of the duties of his office by the cashier will not be excused by the fact that it was done with the sanction of the board of directors. In the important case of Minor *v.* Mechanics' Bank the defendant sought to set up as a defense that the practice of allowing certain persons to overdraw their accounts (which was

[65] Second Nat'l Bank *v.* Burt, 93 N. Y., 233.

[66] Wallace *et al. v.* Exchange Bank of Spencer, 126 Ind., 265.

[67] *Id.*

[68] *Id.* If the by-laws of a bank provide for the appointment of an executive committee without whose sanction the bank is to make no loans above a certain amount, the committee to consist of the president, cashier, and a designated director, of whom a majority are to have the power to act, the failure to designate a director does not affect the power of the president and cashier to act as such committee. *Id.*

one of the grounds of the alleged neglect of the cashier) was known to the president and directors, and was expressly or tacitly acquiesced in and approved by them.[69] But it was held that the defense was not good. And in the course of that part of the opinion devoted to this question the court said: "It [the instruction prayed for] supposes that the usage and practice of the cashier, under the sanction of the board, would justify a known misapplication of the funds of the bank. What is that usuage and practice as put in the case? It is a usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank. Stripped of all technical disguise, the usage and practice thus attempted to be sanctioned is a usage and practice to misapply the funds of the bank, and to connive at the withdrawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty both of the directors and the cashier as cannot receive any countenance in a court of justice. It could not be supported by a vote of the directors, however formal; and, therefore, whenever done by the cashier, is at his own peril and upon the responsibility of himself and his sureties." [70]

But although the fact that it is done with the assent of a superior officer will not excuse the cashier for an improper or wrongful act, yet if the circumstances are such that he, exercising reasonable vigilance, would not suspect but that the transaction was right and proper, he will not be held personally liable.[71]

[69] "It is not negligence *per se*, in the absence of a by-law, or order of a superior officer, for a cashier to pay the overcheck of a responsible customer. Such overchecking is not uncommon, and in practical banking is almost unavoidable. In effect the payment of an overcheck is a loan without security, upon the implied condition that the account shall be made [good] the next day, or upon notice." Wallace *v.* Lincoln Savings Bank, 89 Tenn., 630, 655. Nor is it necessarily negligence in a cashier to pay overdrafts to a reasonable amount of regular customers who have but little property, but who have credit and are accustomed to pay their debts. *Id.*

[70] 1 Peters, 46.

[71] Commercial Bank *v.* Ten Eyck, 48 N. Y., 305.

BONDS OF OFFICERS.

It is the uniform practice of banks to require bonds of their cashiers, and in most instances bonds are also required from the subordinate officers. In this chapter it is proposed to state briefly some of the rules by which such obligations are governed, and to point out how the undertakings of sureties in such cases are construed.

The Scope of the Undertaking.—In Allison *v.* Farmers' Bank[1] the Court of Appeals of Virginia held that the surety in a bond conditioned for the faithful performance by the principal therein of the duties of book-keeper of the bank was not liable for money taken by him from the teller's drawer, the majority of the court being of the opinion that the surety, when he signed the bond, did not intend to bind himself that his principal would not commit a felony. But the doctrine of this case is not now regarded as sound. In Rochester City Bank *v.* Elwood Wright J., observed: "If the principles upon which this case was decided are to be imported into our law, I see not why every teller may not make false entries and every book-keeper abstract funds at pleasure by transcending the limits of the trust reposed. The doctrines put forth in the majority opinions would substantially cancel all official bonds for the safe-keeping of corporate or public funds." The proper construction of such an engagement appears to be that it guarantees that the person is honest and is a suitable person to be introduced into the bank as an employe thereof, and that if he avails himself

[1] 6 Randolph, 204.
[2] 21 N. Y., 88.

of his position in the bank to abstract its funds his sureties will be liable.[3]

In Rochester City Bank *v.* Elwood the bond was conditioned that the principal obligor, one Gold, should faithfully discharge "the trust reposed in him as assistant bookkeeper;" and the question was whether the embezzling of the funds of the bank by him, under cover of false entries in the books, was a breach of the bond for which the surety was liable. The bank was nonsuited in the court below on the ground that the bond did not cover such an embezzlement. But this judgment was reversed in the Court of Appeals. Wright, J., delivering the opinion, said: "I agree that the surety cannot be holden beyond the fair scope of his engagement, as intended by the parties, when undertaken; but the question is, What was this intention, as expressed in the instrument, construed in the light of the circumstances surrounding its execution? Gold has been elected for a post in a banking institution which brought him into close and constant proximity with its money and property. His place was behind the counter of the institution, and practically he had nearly the opportunity of the cashier or teller to embezzle the funds of the corporation, and a better one to conceal such embezzlement and prevent its immediate detection. The receiving and paying out of the money of the bank was done by the cashier or teller, but it was not their duty to keep constant and exclusive watch over it. The temptation to purloin money constantly besets those employés of a bank who are directly within reach of it. These things are presumed to have been known to the parties, and under the circumstances the defendant Elwood guarantees that the appointee shall faithfully discharge a trust, as one of its employés, reposed in him by the bank. Now, can it fairly be said that the parties only contemplated and Elwood only intended a guaranty that Gold should keep the books of the bank correctly, and if a loss ensued from

[3] German American Bank *v.* Auth, 87 Penn. St., 419; Rochester City Bank *v.* Elwood, 21 N. Y., 88.

a default in this respect he would respond to the extent of such loss? I think not. . . . It seems to me that to carry out the intent of the parties the instrument should be construed as an absolute engagement of the defendant for the integrity and fidelity of his principal in the discharge of the trust reposed in him as an assistant book-keeper in the bank. The contract did not define the trust reposed, but indicated the department of duty to be assigned, and guaranteed that the appointee was a trustworthy person to be introduced into the bank to discharge that duty. Its obvious intention was to vouch for his honesty and fidelity to his trust as an employe of the bank."

Surety Released if Duties of Officer Are Changed.—If a surety has undertaken for the faithful conduct of a person in a particular office of the bank, a substantial change in the duties of the office will operate to discharge the surety, for this would be a variance from the obligation which he has assumed. Accordingly, it has been held that the surety upon the bond of a book-keeper was released because his principal had been assigned to perform additional duties as teller.[4] So, in a Canadian case, it was held that a surety for the performance of the duties of bank agent could not be made responsible for losses accruing after the agent had been appointed cashier, because the nature of the agency had been changed and the responsibilities were different, though really not so onerous as before.[5]

But the surety will not be discharged merely because new duties are assigned to the officer, if such duties are fairly within the scope of the office. Where a surety had undertaken that his principal would faithfully discharge "the trust reposed in him as assistant book-keeper," it was held that false entries made by the principal in the credit journal constituted a breach of the bond, though at the time the bond was given this book was kept by the

[4] Home Savings Bank *v.* Traube, 6 Mo. App., 221.
[5] Bank of Upper Canada *v.* Covert, 5 Upper Canada Q. B., 541.

teller.[6] The court, by Wright, J., observed: "Conceding that the surety covenanted that Gold should do his duty as an assistant book-keeper merely, making entries in the credit journal was book-keeping, and was within the range of the class of duties that might be appropriately assigned to an assistant book-keeper. The teller, it is true, kept this book for some months after Gold went into the bank, and, in doing so, it might be appropriately said that he was acting as assistant book-keeper. We are not informed what books were assigned to Gold to keep when he entered the bank; but is not the idea an absurd one, that the managers of the bank could not assign to him the keeping of another book without releasing the surety from his obligation?"

Whether Sureties Released by Increase of Capital.—Whether the increase of the capital of a bank will discharge the sureties on the bond of a cashier or other officer will depend upon the nature of the undertaking and the circumstances of the particular case. Naturally, the presumption must be that it is within the contemplation of the parties that the bank will enlarge its business by all lawful ways and means not going beyond a banking business; and if the law in existence at the time the bond is made authorizes the increasing of the capital stock, an increase made in pursuance of such authority must be presumed to be within the condition of a bond where the terms are broad enough to include it in fair and reasonable intendment.[7] In a case in Delaware where the sure-

[6] Rochester City Bank *v.* Elwood, 21 N. Y., 88.

[7] Lionberger *v.* Krieger, 88 Mo., 160. The condition of the bond in this case was as follows: "Now, if the said J. Philip Krieger, Jr., shall well and truly and faithfully perform the duties of cashier of said bank for and during all the time he shall hold such office of cashier of said bank, and for and during all the time he may continue to act as such cashier of said bank, whether under the present appointment or under future reappointments, and shall well, truly, and faithfully account for and render over to said bank all such money," etc., "and shall, while he continues in such service either under the

ties of a cashier contended that they were discharged by an increase in the capital stock of the bank it was said by the court: "The simple answer to the proposition is that there was no enlargement of the duties of the officer. The sphere of his duties was the same, although the subject-matter of his charge might be increased, which is no more than what happens from day to day from the fluctuation in the amount of the deposits." [8]

Sureties Not Released by Neglect or Connivance of Superior Officers of Principal.—The sureties are not relieved from liability by the failure of the directors or managing officers to exercise a suitable supervision over the affairs of the bank, and to properly inspect the work of the officer or employé who is the principal in the bond.[9] A surety for a teller set up as a defense that before and at the time he signed the bond the bank had in force a by-law which required that the cashier should carefully observe the conduct of all officers employed under

present appointmment or any future reappointment, faithfully and to the best of his ability perform all trusts reposed in him, and all duties devolved on him by the law of the land or by any by-law, rule, order, or resolution of said board now existing or hereafter made, enacted, or adopted not inconsistent with the laws of the land, then," etc. This is a very good form for a cashier's bond, and may be safely adopted as a precedent.

[8] Bank of Wilmington and Brandywine *v.* Wollaston, 3 Harrington, 90. But see Grocers' Bank *v.* Kingman, 16 Gray, 473. In the latter case it was held that sureties who had undertaken to save the bank harmless from every loss that might arise from the cashier's mistakes, as well as losses arising from his fraud, were discharged by an increase of the capital from $300,000 to $750,000. Possibly this case is susceptible of being distinguished from the cases which sustain the doctrine stated in the text; but, nevertheless, it is submitted that the principle of construction adopted in that case is much stricter than those which in the more recent authorities have been applied to the undertakings of guarantors.

[9] Chew *v.* Ellingwood, 86 Mo., 260; State, to use of Southern Bank *v.* Atherton, 40 Mo., 209; Amherst Bank *v.* Root, 2 Metc., 522; Morris Cana and Banking Company *v.* Van Vorst, 1 Zabriskie (N. J.), 100.

him; that he should daily examine the settlements of the cash accounts of the bank and take charge of the same, and whenever the actual account should materially disagree with the balance of the cash account he should report the same to the president and directors without delay; and that it was his duty to ascertain by personal examination how the account stood. It was alleged, also, that there was another by-law in force which provided that a committee of three directors should be appointed, whose duty it should be, among other things, to suddenly and without previous notice count the teller's cash-book. at least once in each month, and in the same manner to count all the cash of the bank at least twice in each year, without notice, and with as much variation in time as would be most likely to frustrate any attempt to conceal any abstraction of funds that might have been made. The surety further alleged that he was induced to become security on the bond of the teller because he knew of the existence of these by-laws and requirements, and with the confident expectation that they would be enforced, but that the directors and officers had wholly failed to carry them into effect. But it was held that this neglect on the part of the teller's superiors was no ground of defense for his sureties. The court said: "We cannot accede to the first proposition of the counsel for the defendant, that he is exonerated by reason of the negligence of the cashier and directors of the bank in failing to make frequent examinations of the affairs of the bank, to count the money, inspect the books, and generally to watch over its concerns. Their duties were perhaps not as diligently performed as they ought to have been, but the rules and by-laws were simply directory. They were intended to prescribe the duties of the cashier and directors, and a faithful compliance with them would no doubt result indirectly in favor of the sureties by tending to an early and speedy disclosure of fraud; yet a failure to comply with them cannot be held as a precedent condition to the sureties' liability. The principle contended for would have the

effect to deprive a corporation of all remedy against one agent on account of the negligence or default of another. The cashier might excuse himself by pleading the failure of the directors to perform their duty, and the directors would excuse themselves by showing that the cashier had been guilty of neglect and omitted to execute the trust devolved upon him."[10]

Nor will it release the sureties that the acts alleged as a breach of the bond were permitted or connived at by the directors or managing agents.[11] If their principal has been dishonest, it is no excuse that there were other unfaithful officers; and if he has done illegal acts, the acquiescence or connivance of his superior officers affords him or his sureties no protection. But the doing of an improper or illegal act at the direction of his superior, when he has no reason to suppose that the act is legal or improper, will not constitute a breach of an officer's bond.[12]

Effect of Laws Requiring Bonds.—Banking laws and bank charters frequently require that certain designated officers of the bank (as, for instance, cashiers) shall give bonds before entering upon the duties of their offices, and sometimes the statute or charter prescribes the conditions of such a bond. But the effect of such a statute is not to render void a bond which is not in conformity thereto; but such bond, though invalid as a bond under the statute, will be valid as a common-law bond if there is nothing immoral or unlawful in its stipulations.[13]

Directors as Sureties.—It is not considered proper that a director should be a surety upon the bond of an officer of the bank. But where a director does become such a

[10] State, to use of Southern Bank, *v.* Atherton, 40 Mo., 209.

[11] Minor *v.* Mechanics' Bank, 1 Peters, 461; Chew *v.* Ellingwood, 86 Mo., 260; Market Street Bank *v.* Stumpe, 2 Mo. App., 545.

[12] Commercial Bank *v.* Ten Eycke, 48 N. Y., 305.

[13] Franklin Bank *v.* Cooper, 36 Me., 179; Lionberger *v.* Krieger, 88 Mo., 160.

surety, neither he nor his co-obligors can set up this fact as a matter of defense.[14] In Amherst Bank *v.* Root, where the point was raised that the cashier's bond was void as against the policy of the law because three of the directors, whose duty it was to examine and approve the bond, were sureties thereon, Shaw, C. J., said: "This exception certainly comes with a very bad grace from those directors who thus became sureties. It sets up the dereliction of their duty as directors to avoid their obligation as contractors. It may have been in very bad taste, it may have been indiscreet and ill-judged to put themselves in a situation to express an opinion on their own sufficiency as such sureties. But whether right or wrong, it is impossible to perceive how the obligors, either such directors themselves or their co-obligors, can avail themselves of this circumstance to avoid their obligation."

And it would seem that upon principles of law now well settled the director could not set up his disability as a defense, even though the statute should, as is the case in some States, expressly forbid that a director should be such a surety.

[14] Amherst Bank *v.* Root, 2 Metc. (Mass.), 522.

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